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INDEX OF CASES.

Supreme Court of the United States

WILLIAM DUHNE,
Complainant,

against

THE STATE OF NEW JERSEY and others,
Defendants.

BRIEF ON BEHALF OF COMPLAINANT

on rule requiring defendants to show cause why the bill should not be filed.

On the 16th day of December, 1919, complainant made application for leave to file a bill against the State of New Jersey and the necessary officers of the United States in a suit to procure an adjudication that the so-called "Eighteenth Amendment" to the Constitution of the United States was invalidly adopted and never became an amendment to, or a part of, the Constitution. The bill asked equitable relief against all the defendants restraining them from taking any steps to enforce the amendment or allowing it to be enforced within the territorial limits of the State of New Jersey.

The Court reserved decision on the motion and thereafter made a rule requiring the defendants to show cause on the 5th day of January, 1920, why the bill should not be filed.

Now, upon the return day of the rule, complainant appears in support of it, and submits this brief to show that the Court has jurisdiction of the subject-matter of the action and of the parties defendant, and that on the merits the bill is good.

POINT I.

The bill is not frivolous. On the contrary, it involves the determination of the most important question that can ever come before this Court, to wit: Is our Government constitutional, or is it more absolute and arbitrary than any known in history?

The legislatures of thirty-six states, acting at the instance of the Congress of the United States, have assumed to ratify a supposed amendment to the Constitution which differs from every other amendment which has been hitherto adopted, in that it assumes to regulate the private life of the citizens of the states within the territorial limits of the states themselves.

If the methods which have been pursued in this procedure are constitutional and valid, then it follows that a bare two-thirds of a bare majority of the membership of the two houses in Congress and a bare majority of a bare majority of the membership of three-fourths of the state legislatures can constitutionally adopt any amendment to the Constitution which they may desire. If opposition develops in the houses of Congress or the state legislatures, the number of votes necessary to adopt any

amendment to the Constitution will only need to be increased to a bare two-thirds of the two houses of Congress and a bare majority of three-fourths of the state legislatures as a maximum. In other words, a group of public officials, which at the maximum may be less than 2,800 and at the minimum may be less than 1,400, hold in their hands the Constitution of the United States and the property, the liberty, and even the lives of one hundred and ten millions of people. Their power, if the "Eighteenth Amendment" has been constitutionally adopted, is absolute and arbitrary beyond that of any group of men known to history.

The bill here offered for filing undertakes to present all the possible grounds for denying the existence of any such absolute and arbitrary power. It is believed that the bill is complete in that particular, and that there are no other valid grounds upon which to assail the "Eighteenth Amendment."

Such a bill cannot possibly be frivolous. On the contrary, it presents the greatest issue that was ever brought before this Court for decision. It presents in fact the question: Have we a Constitution, or have we a government more absolute and arbitrary than any known in history?

POINT II.

The Court has jurisdiction of the subject-matter of the suit. The question involved is justiciable and not political.

It may be objected that the question of the validity of the "Eighteenth Amendment," which is the gravamen of this action, is non-justiciable in its nature, being essentially political, and, therefore, not within the range of judicial inquiry.

We do not apprehend that this objection will be seriously urged. The Constitution of the United States declares in Article III, Section 1, Clause 2 that "the judicial power shall extend to *all* cases, in law and equity, arising under this Constitution." Such a mandate brings every case either at law or in equity "arising under this Constitution" within the judicial power of the nation and, *ex vi termini,* makes it justiciable.

Under the allegations of the bill the question is presented whether the various acts of the Congress of the United States and of the legislatures of the several states are within the powers possessed by the peoples of the United States and of the several states, or delegated to their representatives, under the provisions of the Federal Constitution, and whether the resultant of those acts, to wit, the "Eighteenth Amendment," is in fact an amendment to, or a part of, the Federal Constitution. That these questions arise under the Constitution is self-evident. No argument can be adduced to support the position, nor any adduced to controvert it. It may be said, however, that this Court is continually inquiring into the authority of the Congress and of the state legislatures, as defined and limited by the

Constitutions of the United States and of the several states, and the character of the inquiry demanded in the instant cause differs in no particular from those other inquiries which we have just mentioned. If the ordinary question of the constitutionality of a statute is justiciable, then, by the same token, the question of the validity of this amendment, which turns upon precisely the same considerations, is also justiciable.

POINT III.

The State of New Jersey is a necessary party defendant in this action.

In some high respects, this suit is similar to a bill of interpleader.

Complainant has been all his life accustomed to regard the State of New Jersey as the source of the law which he is to obey, as, in other words, the sovereign whose mandates regulate his conduct in his private life. Now the Federal Government claims the authority, at least in part, to issue similar mandates and to regulate his private conduct and establish the rules which he must obey. He is, therefore, confronted with a double claim to his allegiance, and he seeks in this proceeding in equity to have the claim judicially determined by the only court that can determine it. He seeks in this proceeding to ascertain whether the sovereignty to which he has hitherto given his allegiance has been transferred in part from the state of his citizenship to the United States of America, and to determine that question he must have both parties before the Court. His bill, therefore, is in the nature of a

bill of interpleader with respect to the sovereignty to which primarily he owes his allegiance, and the parties to it represent the two claimants to that sovereignty.

If the bill could have been drawn in the form in which it ought to be drawn, the United States of America would have been one party and the State of New Jersey would have been the other. There is no way, however, by which the United States of America may be made a party defendant, and the only method by which complainant can secure a determination of this question of disputed sovereignty is to join as parties defendant the officers of the United States whose duty it is to assert the sovereignty of the United States, and, having joined them, to show that the sovereignty which they are attempting to assert does not exist, and that consequently their efforts to assert it are *ultra vires*, null and void.

No such difficulty confronts him with reference to the State of New Jersey, and consequently the state is made a party defendant *eo nomine*.

In spite, therefore, of the difference in the character of the defendants, the nature of the bill remains the same: it is an effort by complainant as a citizen of the State of New Jersey to have this Court determine for him whether or not, in the particulars covered by the "Eighteenth Amendment," he is under a duty to obey the mandate of the United States of America or under a duty to obey the mandate of the State of New Jersey. To that controversy the State of New Jersey is indeed a necessary party.

POINT IV.

This Court has jurisdiction of all defendants and the State of New Jersey may be sued in this Court as a sovereign entity.

The real question as to the jurisdiction of this Court is presented by the fact that the State of New Jersey is a party defendant. The correctness of complainant's procedure is determined beyond the possibility of a doubt by the following provisions of the Constitution:

> "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish" (Art. III, Sec. 1).
>
> "The judicial power shall extend to *all* cases, in law and equity, arising under this Constitution" (Art. III, Sec. 2, Clause 1).
>
> "In all cases * * * in which a State shall be a party, the Supreme Court shall have original jurisdiction" (Art. III, Sec. 2, Clause 2).

The question presented by the bill now offered for filing arises under the Constitution. It is, therefore, as we have seen, within the judicial power of the United States and of this Court. A state is a party to it and, therefore, this Court has original jurisdiction, and this bill is an application for relief to the original jurisdiction of this Court. Complainant's bill, therefore, is within the letter of the Constitution.

The letter of the Constitution is a constitutional mandate, absolute, definite and imperative. The

question which complainant raises in his bill is within the judicial power of the United States, and the courts of the United States are not at liberty, in any circumstances whatsoever, to decline the jurisdiction which is confided to them by the Constitution.

So far as complainant has been able to ascertain, this is the first time in the history of this Court in which a citizen of a state has made application to it to exert its jurisdiction against the state of which he is a citizen. There has been a considerable discussion of that point in the decisions, but, because the question has never been presented directly, all the discussion of it necessarily has been *obiter*.

The *dicta* have been in direct and irreconcilable conflict. Sometimes it has been said that a state cannot be sued without its consent, and that, consequently, the constitutional mandate is not applicable to such a case. Sometimes it has been said, to the exact contrary, that the constitutional mandate is imperative, and that in a case in which a constitutional question is presented a state may be sued in this Court without its consent.

The leading case in which the negative of the question has been most carefully considered and upheld is that of

Hans v. *Louisiana*, 134 U. S., 1.

The discussion was clearly *obiter*, because the state was sued in the Circuit Court of the United States for the Eastern District of Louisiana, and the Judiciary Act provided that jurisdiction of the circuit courts should be "concurrent with the courts of the several states." Inasmuch as the state

courts of Louisiana did not have power to entertain a suit against their own state, the Circuit Court had no such power. The opinion, however, went beyond the necessities of the situation and declared that, as a general principle, "the suability of a state without its consent" was a thing unknown to the law.

In support of its position the court made the point that if a state may be constitutionally sued in the Federal courts by its own citizens, although it cannot be sued for a like cause by citizens of other states or of a foreign state, "the result is not less startling and unexpected than the original decision of this court that under the language of the Constitution, and original Act of 1789, a state was liable to be sued by a citizen of another state or of a foreign country." We are not aware, however, that an express mandate of the Constitution, imperative, definite, and absolute, may be disregarded because "the result" of it is startling or unexpected.

The court also cites the remarks of various leading statesmen of the country, including our revered Chief Justice Marshall before he went on the bench, to the effect that "it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." We do not understand, however, how the discussions of the Constitution at the time when it was submitted to the states for adoption, or when it was being considered in the Constitutional Convention, can lend any assistance to the attempt to modify the express mandate of the Constitution, definite, absolute and imperative.

The contemporary discussions as to the meaning of the Treaty of Versailles will not, for example, be relevant to the determination of its meaning in subsequent years, if it shall ever be adopted. Otherwise, we should have the absurd result that discussions of its meaning taking place in the English, French and Italian Parliaments, oftentimes in a language unknown to a majority of our people, not communicated even to the authorities of this country charged with the duty of ratifying the instrument, can be subsequently adduced in support of an interpretation which is contrary to the express language of the instrument.

Still again, the court says: "It was argued by the opponents of the Constitution that this clause would authorize jurisdiction to be given to the federal courts of individual suits against the state by citizens of another state or of a foreign state. Adhering to *the mere letter*, it might be so; and so, in fact, the Supreme Court held in *Chisholm* v. *Georgia* [2 Dallas, 419]; but looking at the subject as Hamilton did, and as Mr. Justice Iredell did, in the light of history and experience and the established order of things, the views of the latter were clearly right—as the people of the United States in their sovereign capacity subsequently decided."

The "mere letter" of the Constitution is, however, as we have said before, and cannot reiterate too often, an express mandate of the people of the United States, unambiguous, definite and imperative. By it they have commanded their judges to take jurisdiction of certain enumerated classes of suits, and no one of their judges, no one of their courts, is at liberty to decline that jurisdiction.

These are the insubstantial reasons which have been advanced to support the position that this Court has no jurisdiction of a state without its consent, even in a case arising under the Constitution of the United States. Let us turn to the other view.

In the case of

Cunningham v. *Macon & Brunswick Railroad,* 109 U. S., 446, 451,

this Court said:

> "It may be accepted as a point of departure *unquestioned* that neither a state nor the United States can be sued as defendant in any court in this country without its consent, *except in the limited class of cases in which a state may be made a party in the Supreme Court of the United States by virtue of the original jurisdiction conferred on this court by the Constitution.*"

By far the most elaborate and most comprehensive contribution to the discussion has been made by Chief Justice Marshall in a unanimous opinion of this Court in the case of *Cohens* v. *Virginia,* 6 Wheat., 264. In that case he took a position exactly contrary to that which he had advanced before the Virginia Convention as quoted by this Court in *Hans* v. *Louisiana.* Such a complete reversal of views in a jurist of his weight and authority is a striking tribute to the strength of the argument that the Constitution means what it says. Let us quote some of his language. It was, of course, *dictum,* because the decision in that case was that a writ of error to a state court in which

the United States was a party defendant was not a suit against the United States, but its arguments are unanswerable. After quoting the clause which gives the courts of the Union jurisdiction of all cases in law or equity arising under the Constitution, Chief Justice Marshall says:

> "And this clause extends the jurisdiction of the court to all the cases described without making in its terms any exception whatever and without any regard to the condition of the party. *If there be any exception, it is to be applied against the express words of the article*" (p. 338).

Again he says:

> "Are we at liberty to insert in this general grant, an exception of those cases in which a state may be a party? Will the spirit of the Constitution justify this attempt to control its words? They will not. We think a case arising under the Constitution and laws of the United States, is cognizable in the courts of the Union, *whoever may be the parties to that case*" (pp. 382, 383).

He then points out that

> "if jurisdiction depended entirely on the character of the parties, and was not given where the parties have not an original right to come into court, that part of the 2d Section of the 3d Article, which extends the judicial power to all cases arising under the Constitution and Laws of the United States, will be mere surplusage."

Finally he concludes the discussion in these words:

> "After bestowing on this subject the most attentive consideration, the court can perceive no reason founded on the character of the parties for introducing an exception which the Constitution has not made; and we think that the judicial power, as originally given, extends to all cases arising under the Constitution or a law of the United States, *whoever may be the parties*" (pp. 391, 392).

This discussion of Chief Justice Marshall, be it noted, is the only discussion which grounds itself frankly upon the language of the Constitution and which examines the phrases of the Constitution for the purposes of ascertaining its meaning. It is therefore the only discussion which is truly relevant to the purpose. Its conclusion is inexpugnable. It makes clear the fact that the "mere letter" of the Constitution is also its spirit, and that if the court should depart from the letter it would slay the spirit.

Hitherto in our consideration of this question we have assumed that the State of New Jersey has not given, and will not give, its consent to the maintenance of this suit, and we have assumed that the question whether or not the state can be sued without its consent must be answered in the affirmative in order to sustain the jurisdiction of this Court. This assumption, however, has been made merely for the purpose of argument and has been implicit rather than explicit. We desire, however, to point out that our assumption was unnecessary, that the State of New Jersey has already given an irrevocable consent to be sued in this Court, and that it gave that consent when it ratified the Constitution of the United States. In its act of rati-

fication it consented to the establishment of a judiciary system in which should be vested absolute and complete power to determine all cases arising under the Constitution, and it submitted itself to the jurisdiction of the courts established under those constitutional provisions. In particular, it submitted itself to the jurisdiction of this Court in all cases in which it is a party.

Having once given its consent by ratifying the Constitution, it cannot now withdraw that consent without withdrawing from the Union—which it neither attempts, nor desires, to do. Consequently, its ratification of the Constitution is a continuing assent to the jurisdiction of this Court and is a continuing consent to be sued under the original jurisdiction which has been conferred upon this Court by the Constitution.

In conclusion we may observe that complainant asks that the State of New Jersey be restrained from permitting the "Eighteenth Amendment" to be enforced within its territorial limits; in other words, complainant prays for injunctive relief. It asks this relief against the State, its officers, agents and employees, and therefore asks for nothing which is not properly within the powers of a court of equity. It may be that the state could not be punished *as a state* for an infraction of the injunction, if it were issued; but certainly every officer of the state would be guilty of contempt and could be punished as for a contempt under principles of equity jurisprudence which are too elementary to require the citation of authority.

POINT V.

The bill alleges grounds which are sufficient to establish the lack of authority of those members of the legislative bodies which assumed to propose, and assumed to ratify, the "Eighteenth Amendment," and the consequent invalidity of the "Amendment" itself.

There are a number of constitutive principles of government which are so wrought into the fabric of our institutions that they cannot be validly abrogated even by attempts to amend our Constitutions, whether state or Federal. Complainant's bill sets forth in detail the manner in which those principles are involved in the present crisis, and the manner in which they operate to render the "Eighteenth Amendment" invalid. Those which are relevant are the following:

A. *State Sovereignty.* The states exist as units in a Federal Union. Their sovereign powers can be surrendered by them when the surrender is the explicit and authentic act of their people, but these powers cannot be taken from them without their consent.

B. *Inalienable Rights.* Just as the states possess certain sovereign rights which cannot be taken from them without their consent because they have been reserved, so the people individually, in organizing their states, have reserved certain individual rights which are not surrendered to the community and these also cannot be taken from them without their consent. Among them is the right to use their

natural powers for their present enjoyment so long as they do not thereby cause injury to others, so long, in other words, as they obey the maxim *sic utere tuo ut alienum non laedas.*

C. *Due Process of Law.* Another is the inalienable and reserved right to be heard in their own behalf when their liberties are in question, and to retain their rights and exercise their liberties until it is determined after such a hearing that they are using them to the injury of others.

D. *Just Compensation.* Another inalienable and reserved right is that when the various members of the community are called upon to make a sacrifice for the general good, in so far as the sacrifice of any single member is in excess of that of his neighbors, they shall share his burden to the extent that compensation is possible.

E. *Delegated Powers.* Another constitutive principle in our form of government is that the representatives of the people in their legislative assemblies are subject to all the duties and responsibilities of fiduciaries. They owe to the people the duty of loyalty, and the powers which are delegated to them by the people do not authorize them to destroy or abridge the rights of the people whom they represent.

As we shall see in the sequel, these principles control our Government even when they are not explicitly expressed in our state and Federal Constitutions, but also we shall see that they have been

repeatedly formulated in our state and Federal Constitutions and thus have become the written law of the land. As written and unwritten law alike, they operate as limitations both upon the powers of the people, whether of the Federal Union or of the individual states, and of their delegated representatives. In both their aspects, as written and unwritten law, the "Eighteenth Amendment" is repugnant to them, and is, therefore, beyond the powers of the peoples themselves and of the legislative bodies which have assumed to propose and ratify it.

Before we proceed to a consideration in detail of these principles, some preliminary observations will be of value.

All the principles just defined are definitions of fundamental and admitted rights, and this is by far the most important of the many important aspects of this most important of all constitutional problems.

The *authority* of the American people is only limited by the *rights* of the American people. They may make their government what they please, they may enter upon what enterprises they please, they may make what regulations they please, and the will of the majority shall control—just so far as they do not infringe upon those unquestioned *rights* of the people, even the smallest minority, which it is the object of their government to protect and promote. Consequently, it is only the *rights* of the people which can set limits to the *power* of the people to modify their organic instruments of government. The "Eighteenth Amendment" cannot be shown to be invalid unless it can be shown to be an invasion of the *rights* of the people.

There has been much and grave misapprehension on this point.

For example, there has been advanced a theory that there is a difference between the subject-matter of constitutions and the subject-matter of legislation, and that a constitution, at any rate the Constitution of the United States, is not amendable so as to include merely legislative matter. It has been suggested that under our system of government legislative matter must pass through the legislative bodies and receive executive consideration, while constitutional matters are to be relieved from executive consideration and are to be passed upon by the people. From that assumption as a premise it is further argued that when the Federal Constitution was framed and provisions looking to its amendment were inserted in it, those provisions were not "intended" to permit the addition to it of purely legislative matter. It is then asserted that the "Eighteenth Amendment" contains matter that is essentially legislative, and thence the final conclusion is drawn that the people have divested themselves of the power to add its matter to the Constitution.

The distinction between the subject-matter of constitutions and the subject-matter of legislation is an artificial refinement which does not easily commend itself as a ground for attacking the invalidity of an instrument which has received the approval of thirty-six legislatures of a great federal union. There is little to indicate that it is such a distinction as to limit the powers of the United States to amend their own Constitution. Granting this essential premise, however, for the sake of argument and solely for the sake of argument, we desire to point out that the views thus set forth

turn upon matters of form and not upon matters of substance. They involve the proposition that the people have limited their powers even in matters of form, and that they have so fettered themselves that they cannot, either by themselves or by their delegated representatives, change the form of their compact of union. Furthermore, they involve the assumption that the powers of amendment which the Federal Constitution contains are limited in a manner which is quite inconsistent with the present customs of the people, who are continually amending their state constitution by provisions which are essentially legislative in the meaning of the word as used in the theory under consideration, but which are put into the Constitution for the express purpose of withdrawing them from cognizance by the legislatures. The theory therefore attributes to the word "amendment," a meaning which is entirely different from that which it possesses at the present time, and involves the hypothesis that the word "amendment" as used when the Federal Constitution was adopted was quite different from the word "amendment" as used at the present time.

Apart from the difficulties of proof, the vice in such a theory is that it presupposes limitations upon the popular powers of self-government of which nobody has ever dreamed. It has been a commonplace of our American constitutional views that the powers of the people stop at the infringement of personal liberties; but that there are other shackles upon the powers of the people, shackles which are independent of the liberties of the individual and which are purely formal in their nature, is obviously impossible of acceptance.

Such a principle would lead to the conclusion, for example, that the peoples of the several states could

not ratify any amendment involving legislative detail, even by the unanimous vote of forty-eight popular conventions adhering strictly to the provisions of Article V, because, forsooth, the matter of it was legislative and not constitutional. Formalism can go no further.

There is another theory which has found acceptance. It is to the effect that the division of powers between the State and Federal Governments is such a vital element in our Federal Union that any effort to change it is revolutionary and, therefore, not within the category of admissible efforts to change the Constitution. This again, is a matter which does not concern fundamental rights. It is a theory which presupposes limitations upon the power of the people which do not spring from the necessary conditions of popular government, but are artificial limits which the people have imposed upon their own powers.

There is nothing, however, which is revolutionary in the mere transfer of sovereign powers, either in whole or in part, from the people of the several states to the people of the United States. On the contrary, it is altogether probable that in subsequent years it may become necessary to clothe the Federal Government with powers which it does not now possess and to divest the states of powers with which they are now vested. The ease and rapidity of communication is so swiftly increasing, and the limitations of distance are being so easily overcome, that the individuality of the states is certain to become less and less important with the lapse of time. In truth, the centralizing process by which special powers are surrendered to the Federal Government is evolutionary rather than revolutionary. To suppose that an amendment to the Constitution

which furthers that process is impossible because it is revolutionary is not only to assume that the people have hampered themselves in matters which are not matters of substance, but is also to misunderstand the true process of evolution.

As we have said before, it is not until we come to the question of ultimate rights that we come to the true bounds of popular power. When the states organized the Union they reserved certain rights to themselves and they cannot be deprived of these rights without their consent, but when they consent, the surrender of these rights is not revolutionary, nor does it exceed the powers of amendment inherent in the covenant of union.

We have discussed these two theories, not out of any spirit of criticism, but because a consideration of them will tend to a strong clarification and confirmation of the grounds upon which the "Eighteenth Amendment" is assailed in complainant's bill. With one exception to be noted later, every valid ground of objection to the amendment is based upon fundamental rights. A decision of this Court supporting the amendment as against the objections urged in the bill is, and must be, and will be, a decision that rights which are admittedly fundamental, which are admittedly the basis of our free institutions, which have been the clearly recognized stepping-stones upon which the people of the United States have risen to their present power, prosperity, and happiness, are non-existent in fact and are subject to any arbitrary or oppressive limitation that may be imposed upon the people in the guise of an amendment to the Constitution of the United States. On the other hand, a decision of this Court sustaining either of the two theories which we have just outlined will be a decision that the funda-

mental rights of the people furnish no limitations upon the powers of amendment, but that there are certain matters of form, and not of substance, which furnish their only protection against confiscatory and oppressive additions to the Constitution.

With this preface, let us proceed to a consideration of the constitutive principles invaded by the "Eighteenth Amendment."

A.

State Sovereignty.

It is an essential characteristic of all co-operative effort that the parties to the compact bring to it whatever obligations are necessary in their opinion to the achievement of the common purpose, and that the agreement of co-operation shall define the contribution which each party makes to it. It is also an essential characteristic of co-operative effort that the parties to it reserve all their rights, possessions and liberties which are not by necessary enumeration contributed to the enterprise, and that, as to those rights, liberties and possessions, they are as free after the compact is concluded as they were before. It is also an essential characteristic of such compacts that they cannot be extended to impair or destroy any of the reserved rights or liberties without the unanimous consent of all the parties to the compact.

These truths are obvious upon reflection, and they apply to the thirteen states that organized the Union and to all the states that subsequently joined it. In each case the mere fact of retaining their independent existence as states involved the maintenance of their powers as states, except in

so far as by the instrument of the Union they were surrendered to the federated unity. It also follows that these rights which were thus reserved by the states cannot be taken from them without their consent. Any provision in the covenant that it could be amended after a certain procedure did not, and could not, mean that the reserved rights could be taken away from any state without its consent.

When a number of men form a corporation and provide that the articles may be amended by a certain vote, the amendments which are possible under such a provision are limited to matters which do not affect the rights or properties of the stockholders outside of the corporate assets, and do not extend to the proportionate interests of the stockholders in the assets of the corporation. Nothing less than a unanimous consent of all the stockholders in the corporation can operate to reduce their property interests in it. So long as one stockholder, owning one share of stock, holds out, his interest in a corporation cannot be diminished by the vote of all the other stockholders, and if *his* interest is not diminished, the interests of the other stockholders, even of those who have consented to the vote, are not diminished.

Similarly, in regard to the states, an amendment which pares down the reserved rights of the states and transfers a part of their rights to the Federal Government is ineffective as to any dissenting state; and being ineffective as to any dissenting state is ineffective as to all the rest of them. If Rhode Island had been the only state to refuse to ratify the "Eighteenth Amendment," the result would have been, not merely that its reserved sovereign powers would have remained unimpaired by the ratification of the other forty-seven states,

but that the ratification would have been ineffective as to the other forty-seven as well.

It might be possible for an individual state to surrender to the Federal Government its powers of internal government and police, and that after such a surrender the Federal Government could legislate as effectively within the territorial limits of the state in regard to the surrendered sovereignty as it can now legislate with regard to the territories which are still in its possession; but, nevertheless, on an amendment properly submitted to the states which calls for a general surrender of the powers of internal government and police, the consent of forty-seven of the states to that amendment is not sufficient to give it validity, and it cannot become valid even as to the forty-seven states until the forty-eighth state shall have also given its consent.

The bill alleges that this principle of reserved rights operates to prevent the "Eighteenth Amendment" from taking effect as an amendment to the Constitution of the United States, and the allegation is irrebuttable, because Rhode Island, Connecticut and New Jersey having failed to ratify, their sovereign rights have not been taken away from them and now exist as unimpaired as they were before the resolution was proposed in Congress. Not only are the sovereign rights of these states unimpaired, but the "amendment" has not taken away the sovereign rights of other states which have apparently consented to it. The "amendment" is, therefore, a nullity. It does not confer upon the Federal Government concurrent power to regulate the internal government or police of any state in the Union, and the Constitution is not amended in that particular.

Bill, Section X, paragraph A.

Not only is this true by reason of the essential nature of the Federal Republic, but it is also true by reason of the guaranties contained in the covenant of union of the United States.

After the Constitution was adopted, it was amended by a vote of the states, and among the amendments thus adopted was one which was intended to obviate the possibility of a misunderstanding on this essential subject. The Tenth Amendment expressly declared that the rights not surrendered to the Federal Government or prohibited to the states were reserved to the states. That was more than an amendment to the Constitution. It was a guaranty. It was a contract between the states and the Federal Government. It also operated as a limitation upon, and, therefore, a repeal of, any powers which the original instrument might have contained which were inconsistent with it. If, in other words, the original instrument contained a power by which the Federal Government could absorb the sovereign rights of the states by a vote of three-fourths of them, that power was taken away from them by the Tenth Amendment and ceased to exist, and does not exist at the present time. Whatever rights may be contained in the amendment clause of the Constitution are taken away to the extent of the rights reserved to the states by the Tenth Amendment.

Bill, Section X, paragraph K.

Not only are the sovereign rights of the states inherently inalienable and indstructible, and not only are they guaranteed by the Tenth Amendment to the Constitution of the United States, but in many of the states they have been removed from

the province of the legislature. In those states they cannot be surrendered to the Federal Government, save by the act of the people themselves. Consequently the legislative act of ratification in those states was *ultra vires*, null and void.

Bill, Section X, paragraph U.

B.

Inalienable Rights.

Every constitution in our American republic asserts either that the people have certain inalienable rights or that an enumeration of certain rights in the Constitution does not operate to diminish or impair other rights which are reserved to the people. That principle of inalienable and reserved rights is the inexpugnable law of the land. There is no power resident anywhere in the Union which can take away those inalienable rights. The only question is, what rights are inalienable?

The answer to that question is simple. It is found in the Latin maxim, which is a commonplace of our jurisprudence, *sic utere tuo ut alienum non laedas*—do not so use your property as to injure your neighbor. Subject to that limitation, every American may use his natural liberty in the enjoyment of his property and in the pursuit of his happiness, and there is no authority in the country which can lawfully deprive him of that liberty. It is an inherent right. It rises superior to constitutions and statutes and will be protected by the courts. This was explicitly declared by this Court in the case of

Loan Association v. *Topeka*, 20 Wall., 655,

in which it was held that a state statute was void, even in the absence of constitutional provisions limiting the powers of the legislature, upon the simple ground that it invaded inherent rights of the people. The statute in that particular case levied a tax on the people for the support of a private enterprise. As the Court put it at page 662, "the law authorizing it was beyond the legislative power, and so was an unauthorized invasion of private right." The Court then went on to say:

> "It must be conceded that there are such rights in every free government beyond the control of the state. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism. It may well be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many.
>
> "The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers.
>
> "There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are

> respected by all governments entitled to the name. No Court, for instance, would hesitate to declare void a statute which enacted that A and B, who were husband and wife to each other should be so no longer, but that A should thereafter be the husband of C and B the wife of D. Or which should enact that the homestead now owned by A should no longer be his, but henceforth be the property of B."

It is not necessary to burden the Court upon any branch of the law of this case with unnecessary citations. The complainant's position rests upon principles which are too obvious to admit of dispute, and one expression of views by this Court, such as we have just quoted, is amply sufficient for our purpose. When all the constitutions in the country and the considered opinion of this Court unite in the expression of a given view, further authority seems superfluous.

The inalienable rights of the people of the United States are invaded by the "Eighteenth Amendment," because it not only prohibits the use of alcohol in circumstances in which injury to the community will necessarily ensue, but also in circumstances from which injury cannot possibly result. That a moderate and sober use of alcoholic beverages, without injury to the community, is possible —and common—is indisputable. It is within the experience of every man, and yet an intolerable "amendment" assumes to take away that right.

The right to the protection of our fundamental rights springs not only from the fact that they are inherent,

Bill, Section X, paragraph B,

and will be protected by the courts,

Loan Association v. *Topeka,* 20 Wall., 655,

but also by the fact that they are guaranteed by all our constitutions, state and national.

The Ninth Amendment to the Federal Constitution reserves them.

Bill, Section X, paragraph F.

The Fourteenth Amendment guarantees the privileges and immunities of the citizens of the United States, and among those immunities is that granted by the Ninth Amendment with respect to reserved rights.

Bill, Section X, paragraph H.

Those reserved rights are the condition precedent of a republican form of government. If any part of the citizens, minority or majority, can take away the rights of the other part, majority or minority, the government is not republican. The Constitution of the United States (Art. IV, Sec. 4) guarantees a republican form of government to the states, and this Court, as one of the three coordinate branches of the government of the United States, is charged, like the others, with the duty to see that the guaranty is fulfilled. The "Eighteenth Amendment" is in violation of the covenant and is, therefore, void.

Bill, Section X, paragraph J.

The reserved rights of the citizens are in many state constitutions declared to be not subject to any arbitrary or absolute power, they are excepted

out of the powers of government, they are inalienable, they are declared to be not impaired by the enumeration of other rights, and they are held to be brought within the protection of the Constitution of the United States,

Bill, Section X, paragraphs M, N, Q, R and S,

and in those states, the legislatures have no authority to impair or abridge them, even by ratifying proposed amendments to the Constitution.

To sum it all up, there is no lawful authority anywhere in this Union or in any of its parts to forbid a citizen of the United States to indulge in the moderate and sober use of alcoholic beverages, when no injury results therefrom to others —and that means that *some* use of alcoholic beverages is permitted to *every* man, and that *all* use cannot be prohibited to *any* man.

C.

Due Process of Law.

Another fundamental principle at the base of our governmental system is that before any man can be deprived of his liberties upon any ground whatsoever, he shall be entitled to be heard in his own behalf. This right is defined by the phrase "due process of law," and that phrase means that it is the process of the law to which every man is entitled when his rights are assailed or questioned. There must be a charge against him. He must be notified of the charge. He must have an opportunity to present arguments in his own behalf, and if

questions of fact arise, to adduce evidence relevant to the issue, and to have all this take place before a tribunal which is vested with appropriate jurisdiction to determine the question.

This tribunal need not be a court in the technical sense of the word, but it must be a tribunal which exercises judicial functions, which determines the issue upon evidence and argument, and which must have the power to ascertain all the facts necessary to a determination. A board of tax assessors is a tribunal in that sense of the word. Public Service Commissions are tribunals in that sense of the term. The Draft Boards were tribunals in that sense of the term. In all these cases, a man whose rights are at stake is entitled to notice, to his hearing, and to an opportunity to produce any and all facts relevant to the issue, in a word, to his day in court.

For years there has been a vigorous assault upon the use of beverages containing alcohol. There have been countless charges made of its iniquity and of its injurious effect upon the community, and as a result there have been numerous statutes enacted in the various states of the Union, and now the "Eighteenth Amendment" has been adopted, prohibiting the use of it altogether. Nevertheless in spite of that attack, which has been continued for so long, no man whose rights or liberties have been thus brought in question, whether he be manufacturer, dealer, or user, of alcoholic beverages, has ever had his day in court to meet the charge that the community suffers damage at his hands. There has never been a case in court in which such charges have been alleged by pleadings, in which those concerned have had an opportunity to deny them by pleadings, in which there has been any evidence adduced to prove or disprove the charges, or in which

there has been an unbiased or competent tribunal to hear and determine the issue. The states have legislated on the subject without practical let or hindrance, and the industry has been alternately petted and choked, fostered and prohibited, with a disregard of the first considerations of the constitutional right to the day in court which is almost without parallel.

Not only has this happened, but, except in one case (*People* v. *Wynehamer,* 13 N. Y., 378), the right of those who are concerned to be heard in a court before their liberty or property is taken away seems never to have been demanded. We are not particularly concerned with the cases in the state courts, but we are concerned to point out that in this Court the question which we are now presenting as to the right of those who use or deal in beverages containing alcohol to their day in court on the question of their injuring the community of which they are members before their liberty or property can be taken away, is a new question, undiscussed, and of absolutely first impression.

The first case before this Court which involved the question of the due process of law and prohibition was

Bartemeyer v. *Iowa,* 18 Wall., 129.

An Iowa statute prohibited the traffic in alcoholic liquors within the state. The statute was assailed as unconstitutional as being in violation of the due process clause of the Fourteenth Amendment. The case was submitted on briefs, but the Court declined to pass upon that issue of the constitutionality of the act, because it was satisfied "that a moot case was deliberately made up to raise the particular

point when the real facts in the case would not have done so."

The issue might have been presented in the later case of

Beer Co. v. *Massachusetts*, 95 U. S., 25,

which grew out of a prohibitory law of Massachusetts. Counsel for the Beer Company, however, which was operating under an ancient charter, based their contention upon Article I, Section 10, Clause 1 of the Constitution, which forbids the states to pass any law impairing the obligation of contracts, and declined to avail themselves of the due process clause of the Fourteenth Amendment. The language of their brief is that "the company does not invoke the aid of the Fourteenth Amendment to the Constitution, but submits that the statute * * * impairs the obligation of the contract contained in the charter."

This Court, although the Fourteenth Amendment was not invoked by the defendant, concluded its opinion in this language:

> "Since we have already held in the case of *Bartemeyer* v. *Iowa* as a measure of police regulation looking to the preservation of public morals, a state law prohibiting the manufacture and sale of intoxicating liquors is not repugnant to any clause of the Constitution of the United States, we see nothing in the present case that can afford any sufficient ground for disturbing the decision of the Supreme Court of Massachusetts."

As we have seen, however, in the *Bartemeyer* case the Court declined to discuss the question whether

prohibition was repugnant to the Fourteenth Amendment, and consequently its statement in the *Beer Company* case is erroneous.

The third case to come before this Court involving prohibition and due process of law was

Mugler v. *Kansas*, 123 U. S., 623,

which grew out of a Kansas prohibitory statute. *All the counsel in that case, however, began their argument by conceding that prohibition within the state was constitutional.* Senator Vest, of counsel for one of the defendants, admitted that "the state has unquestionably the power to prohibit the manufacture, for sale or barter, of intoxicating liquor within its limits" and Mr. Joseph H. Choate began his argument with the concession that the Legislature of Kansas was the "sole judge of how far they should go in forming the morals and habits, and regulating the appetites and prescribing the food and drink of the people of Kansas."

Although counsel thus refused to discuss the question of the constitutionality of prohibition within the state, they did advance an argument which turned ultimately upon the due process clause. It may be summarized as follows:

> "We concede that the state under its police power can constitutionally prohibit the manufacture of alcoholic beverages for barter or sale to its own citizens, but nevertheless it cannot prohibit the manufacture of alcoholic beverages for barter or sale to persons outside of the state, because those persons are beyond its police power and not subject to its jurisdiction, and as to them the

state does not possess the regulatory powers which it possesses over its own citizens.

Consequently in prohibiting the manufacture of alcoholic beverages for sale without the state the legislature exceeded its powers and therefore deprived the defendants of their liberty and property without the due process of law guaranteed to them by the Fourteenth Amendment."

The Court answered this argument in the following language:

"A portion of the argument on behalf of the defendants is to the effect that the statutes of Kansas forbid the manufacture of intoxicating liquors to be exported or to be carried to other states, and upon that ground are repugnant to the clause of the Constitution of the United States *giving Congress power to regulate commerce with foreign nations and among the several states.* We need only say, upon this point, that there is no intimation in the record that the beer which the respective defendants manufactured was intended to be carried out of the state or to foreign countries. And, without expressing an opinion as to whether such facts would have constituted a good defense, it is observed that it will be time enough to decide a case of that character when it shall come before us."

We have examined the original record of this case in the library of the Bar Association of the City of New York. It is deficient in some particulars. For example, it does not contain the brief of Mr. Choate. So far as we have been able to ascertain, however, the record nowhere mentions the commerce clause of the Constitution. It was not mentioned in the assignment of errors, and it is not

mentioned in the report of the case by the official reporter. We do not understand, therefore, how this Court could have supposed that the argument was based upon the commerce clause in the body of the Constitution when it was in truth based upon the due process clause in the Fourteenth Amendment.

Although counsel for the defendants refused to discuss the question of the constitutionality of the prohibitory statute within the jurisdiction of the states, the Court discussed it in its opinion at considerable length. Thus it appears that the Court discussed a question which counsel *did not* argue, and, upon an erroneous statement of the condition of the record, declined to decide a question which counsel *did* argue.

A court is always at a disadvantage when it discusses any question without the aid of argument by counsel, and the results are apt to appear in its opinion. This is true of the discussion of the Court in the *Mugler* case. Twice this Court declared that the Fourteenth Amendment was superior to the police power of the states, and twice declared that the police power of the states was superior to the Fourteenth Amendment.

On the point of the superiority of the police power to constitutional prohibitions it says:

> "In *Beer Company* v. *Massachusetts*, 97 U. S. 25, 33, it was said that, 'as a measure of police regulation, looking to the preservation of public morals, a state law prohibiting the manufacture and sale of intoxicating liquors is not repugnant to any clause of the Constitution of the United States.' Finally, in *Foster* v. *Kansas*, 112 U. S. 201, 206, the court said that the question of the

constitutional power of a State to prohibit the manufacture and sale of intoxicating liquors was no longer an open one in this court" (p. 659):

Again it says:

> "No one may rightfully do that which the lawmaking power, upon reasonable grounds, declares to be prejudicial to the general welfare.
>
> "This conclusion is unavoidable, unless the Fourteenth Amendment of the Constitution takes from the States of the Union those powers of police that were reserved at the time the original Constitution was adopted. But this court has declared, upon full consideration, in *Barbier* v. *Connelly,* 113 U. S. 27, 31, that the Fourteenth Amendment had no such effect. After observing, among other things, that that amendment forbade the arbitrary deprivation of life or liberty, and the arbitrary spoliation of property, and secured equal protection to all under like circumstances in respect as well to their personal and civil rights as to their acquisition and enjoyment of property, the court said: 'But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity'" (p. 663).

On the other hand, the Court twice declares that in such matters the Constitution is supreme. It says:

> "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon an inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to these objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution" (p. 661).

And again:

> "Undoubtedly the State, when providing by legislation for the protection of the public health, the public morals, or the public safety, is subject to the paramount authority of the Constitution of the United States, and may not violate rights secured or guaranteed by that instrument or interfere with the execution of the powers confided to the general government" (p. 663).

There is another branch of the *Mugler* case which also requires consideration. The statute there under consideration provided that "all places where intoxicating liquors are manufactured * * * are hereby declared to be common nuisances."

A nuisance is defined to be "anything that unlawfully worketh hurt, inconvenience, or damage. 3 *Blackstone's Commentaries*, 5, 216."

> *Bouvier's Law Dictionary, sub voc.* Nuisance.

The question therefore arose in the *Mugler* case whether a place where intoxicating liquor was manufactured was a place which worked hurt, inconvenience or damage, and whether a declaration by the legislature that a brewery was such a place was repugnant to the due process clause of the Fourteenth Amendment. Counsel advanced the obvious argument that that declaration of the statute deprived them of their day in court upon the question of whether it worked hurt, inconvenience or damage, and in support of their argument they pointed out that the inquiry which the statute permitted related only to the question whether the given place was a brewery, and that they were foreclosed of their right to prove that it worked no hurt, inconvenience or damage.

The Court answered the contention of counsel in this language:

> "Nor is the Court required to adjudge any place to be a common nuisance simply because it is charged by the state to be such. It must first find it to be of that character; that is, must ascertain, in some legal mode, whether since the statute was passed the place in question has been, or is being, so used, as to make it a common nuisance."

Again the Court was in serious error. It declared that the statute permitted the inquiry which takes place in every case in which there is a charge of maintaining a public nuisance, whereas the fact was that the statute foreclosed it absolutely.

The *Mugler* case may be summed up as follows:

1st: Counsel conceded that prohibition was not *per se* repugnant to the due process clause of the Fourteenth Amendment.

2nd: The Court discussed that question without the aid of counsel and reached the conclusion which counsel conceded.

3rd: The Court in its discussion took two inconsistent positions: one that the police power of the states was superior to the Fourteenth Amendment, and one that the Fourteenth Amendment was superior to the police power of the states.

4th: The Court misapprehended the mandate of the due process clause and omitted to observe that it guaranteed a judicial procedure which the statute in the case before it denied.

5th: The Court declined to pass upon the first issue raised by counsel for the defendants upon the erroneous statement that it was based upon the commerce clause in the body of the Constitution when it was in fact based upon the due process clause of the Fourteenth Amendment.

6th: The Court overruled the contention of counsel that they had had their day in court on the question of nuisance upon the erroneous statement that the statute permitted a judicial inquiry into a fact which the statute distinctly forbade.

The next case in this Court was

Kidd v. *Pearson*, 128 U. S., 1.

Like the *Mugler* case, it involved the question of prohibition within the state and also the prohibition of manufacture for export without the state. On the question of prohibition within the state the Court held itself bound by the decision in the *Mugler* case. On the question of manufacture for export, the Court held that the statute was not repugnant to the commerce clause in the Constitution, because that clause begins to take effect only when transportation begins, and does not operate during manufacture prior to transportation. Neither counsel nor court considered the question whether prohibition denied the day in court on the issue of injury to the community.

The next case,

Crowley v. *Christensen*, 137 U. S., 86,

was colorless. It contains no reference by either court or counsel to prior decisions and does not discuss the right to a day in court.

Another case which came to this Court was

Purity Extract Co. v. *Lynch*, 226 U. S., 192.

The Mississippi legislature enacted a statute which prohibited the sale of "vinous, alcoholic, malt, intoxicating or spirituous liquors or intoxicating bitters or other drinks, which, if drunk to excess, will produce intoxication."

The question was whether the statute forbade the sale of a beverage known as "Poinsetta." The case came up on an agreed statement of fact. An exam-

ination of the record shows that the facts were stipulated. Among them were these:

> "Poinsetta contains no alcohol.
>
> "Poinsetta is guaranteed under the Pure Food Laws of Congress and no matter to what extent taken will not produce intoxication.
>
> "It has a distinctive odor dissimilar from any intoxicating drink and *cannot be employed as a subterfuge for the sale of beer* because it is bottled in a distinctive way and its name blown in each bottle which contains the beverage."

The Mississippi court held, first, that the sale of Poinsetta was forbidden by the statute whether it was intoxicating or not, because it was made of malt, and, second, that its sale could be constitutionally prohibited, because the police power of the state was "broad enough to make its prohibitory laws effective and include in its provisions frauds, disguises, *subterfuges,* attempted evasions for beverages easily used as subterfuges and known to be the handmaidens of intoxicating beverages."

In other words, the Court decided that the sale of Poinsetta could be constitutionally prohibited because Poinsetta was a subterfuge when the record before it expressly stipulated that Poinsetta was not a subterfuge.

It is clear that the Mississippi court was saved from the guilt of a deliberate falsehood only by the circumstance that it made no categorical affirmation. It did not in terms assert that Poinsetta was a subterfuge for intoxicating liquors, but it assumed that fact as the implied premise of its conclusion. Its moral guilt is just as great, therefore, as if it perpetrated a deliberate falsehood, be-

cause it deliberately grounded its decision upon premises which it know to be false.

When the case came here, this Court held itself bound, as to the interpretation of the statute, by the decision of the Supreme Court of Mississippi, and counsel for the *Purity Extract Company* apparently made no attempt to bring to the attention of this Court the gross impropriety, to use moderate language, of the decision below. Upon the record thus inadequately presented to it, this Court affirmed the decision of the lower court upon this ground:

> "The statute established its own category [i. e. of prohibited beverages]. The question in this court is whether the legislature had power to establish it. The existence of this power (as the authorities we have abundantly cited demonstrate) is not to be denied because some innocent articles or transactions may be found within the prescribed class. The inquiry must be whether, considering the end in view, the statute passes the bounds of reason and assumes the character of a merely arbitrary fiat."

In other words, this Court held that it was not an arbitrary fiat of the state legislature to prohibit the manufacture of Poinsetta upon the ground that it was a subterfuge when the agreed fact was that it was not, and could not be, a subterfuge. If that was not irrational, when *is* a statute irrational?

The question whether the statute deprived the *Purity Extract Company* of its day in court on the question whether it was doing anything to the detriment of the community was not raised and was not discussed.

The latest case to come before this Court involving a prohibitory statute is:

Hamilton v. *Kentucky Distilleries & Warehouse Co.,*

decided December 15, 1919, and not yet reported.

In that case the statute was the National Prohibition Act. It was assailed as being repugnant to the Fifth Amendment to the Constitution. The main ground of the attack was that the property of the complainants in that case was taken without just compensation. The due process clause was not discussed, either by the Court or by counsel.

At least twice this Court has said that the question of the constitutionality of prohibition under the due process clause is not open to the Court: *Foster* v. *Kansas,* 112 U. S., 201, 206 ("no longer open in this Court"); *Clark Distilling Co.* v. *Western Maryland Railway Company,* 242 U. S., 311, 320 ("not open to controversy"). Our examination of the cases, however, has disclosed the remarkable fact that the right of the citizen to his day in court before his liberty to manufacture, sell or use alcoholic beverages can be taken from him, has never been suggested by counsel or discussed in any of the opinions delivered by this Court. It is presented here and now for the first time in the entire history of prohibitory legislation in the Federal courts, and it presents a case of first impression.

The demand that life, liberty or property shall not be taken without due process of law involves the procedure of the law, and not its substance, except in so far as the substance is involved in the procedure. The procedure which is guaranteed by the Constitution is the procedure of the courts, and

the Constitution consequently takes from the legislature the power of determining questions as to which there is a dispute and as to which a citizen may desire to defend his rights. In other words, the due process clause is but an extension of the distinction between the legislative and the judicial powers. The legislature cannot be the arbiter of disputed facts, and when the facts are disputed, the Constitution guarantees that the parties to the dispute may have the arbitrament of the courts.

If, for example, there is a dispute as to whether the use of alcoholic beverages is injurious to the community, the Court and not the legislature must determine it. If there is a dispute as to whether a given content of alcohol is necessary to make a beverage intoxicating, the Court and not the legislature must determine it. The reason is that in the first place the question is judicial in its nature and not legislative, and, in the second place, that a judicial determination is guaranteed by the Constitution.

The views of this Court upon this question are well expressed in the following quotation from the *Mugler* case, which is a fair statement of the accepted doctrine of the Court:

> "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon an inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to these objects, or is a palpable in-

> vasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.
>
> "Keeping in view these principles, as governing the relations of the judicial and legislative departments of the Government to each other, it is difficult to perceive any ground for the judiciary to declare that the prohibition by Kansas of the manufacture or sale, within her limits, of intoxicating liquors for general use there as a beverage, is not fairly adapted to the end of protecting the community against the evils which result from the extensive use of ardent spirits."

They are similarly stated in the *Purity Extract* case in this language:

> "The inquiry must be whether, considering the end in view, the statute passes the bounds of reason and assumes the character of a merely arbitrary fiat."

This view denies the right to a judicial investigation which is guaranteed by the Constitution. It makes the question of due process turn, not upon the grant or denial of a judicial investigation, but upon the question whether the legislature in enacting its law has acted arbitrarily or irrationally.

We submit, with deference, that this view involves a radical misconception of the effect of the due process clause.

We submit that the occasion can never arise upon which the judicial branch of the Government may inquire whether the legislative branch of the Government has legislated in a manner which is either arbitrary or irrational.

We submit that the only inquiry upon which the judicial branch of the Government can possibly enter with respect to legislative action under a due process clause is to inquire whether the day in court has been established as the condition precedent to the impairment of individual liberty.

We submit that before complainant can be deprived of his liberty to sell beverages containing alcohol, he must, under his right to due process of law, first be afforded his day in court on the charge that his business "worketh hurt, inconvenience or damage," and that his liberty to sell such beverages cannot be taken from him unless and until that charge has been proved by competent evidence.

We submit that no court has authority to prejudge that issue, either upon a theory of judicial notice or of judicial presumptions, but that the burden of proof is on him who brings the charge.

Finally, we submit that in taking these positions we are standing upon "the letter of the law," and that in this instance "the letter of the law" is also its spirit and is the very soul of American civilization. When any American court shall permit the liberties of any American citizen to be impaired or abridged without his day in court, the decline of American institutions will have begun—not to stop until the decision is reversed or overruled.

Now let us see how the due process of law has been guaranteed to complainant.

It has been guaranteed to him by the inherent nature of our republican institutions.

Bill, Section X, paragraph B.

It has been guaranteed to him by the Fifth Amendment to the Constitution of the United States which limits the powers of the Federal Government.

Bill, Section X, paragraph F.

It has been guaranteed to him by the Fourteenth Amendment which limits the powers of the states.

Bill, Section X, paragraph G.

In other words, neither state nor nation can take liberty or property without due process of law, even by constitutional amendment.

It is guaranteed to him by Article IV, Section 4, because that is not a republican form of government, which begins by abolishing in any particular the right to a due process of law in the impairment of right.

Bill, Section X, paragraph J.

It has been guaranteed to him in all the state constitutions.

Bill, Section X, paragraphs M, N, O, Q, R, S and T.

These guaranties leave no room for doubt. If it is charged that a man's use of alcoholic beverages "wortheth hurt, inconvenience or damage," that charge must be proved in court, and there exists no lawful authority in this country which can punish him for it without that proof, constitutional "amendments" to the contrary notwithstanding.

D.

Just Compensation.

While the liberties of the people are constitutionally defended, it is also true that the community may at all times call upon its members for any sacrifice that may be necessary to the common safety. Life itself yields to that need.

The call cannot be denied, even though only one individual out of the whole community may be required to make the sacrifice. If the necessity exists, the sacrifice must be made. The question of its existence is, of course, judicial, to be determined by evidence, and the citizen is entitled to have the necessity proved. His property cannot be taken, for example, to make way for a public improvement without proof that it is for a public use; but if the public use is proved in court, the taking cannot be resisted.

There is one inherent equity, however, which attends a taking in such circumstances; and the equity is this: If any citizen is called upon to make a sacrifice which is in excess of that of his neighbors, the community as a whole must bear its share of the burden and distribute it, so far as possible, among all the citizens. That leads to the doctrine of compensation for the taking of private property. If it be land, the property must be paid for, and the cost of it must be collected by taxation from the rest of the community; if it be services, the services must be paid for, and their cost similarly collected from the rest of the community. Even in the high exigency of warfare for the protection of the very life of the nation, those who are called upon

to defend the nation are to be compensated so far as compensation is possible.

This principle is another of those self-evident and foundation principles which underlie the structure of our Government. There has been, however, a certain misapprehension as to its extent which has made its appearance in our judicial decisions. It is sometimes supposed that when property is taken or destroyed under the so-called "police power of the states" compensation is not necessary. As a rule of constitutional law, so far as it is a rule, this conception seems to have taken its origin in the case of

Sparhawk v. *Respublica*, 1 Dall., 357,

decided in 1788. It appeared in that case that during the Revolution the Colonial Government seized the plaintiff's property and carried it away to a place of supposed safety in order to prevent the British troops from getting it. The effort was unsuccessful, however—the property was eventually seized by the British where it was deposited, and the question arose whether the plaintiff could get compensation for it. The Court decided against him, citing many cases in support of its judgment. That decision and its citations are, it is believed, the historical origin of the constitutional view which we have just outlined.

The authorities on which the Court in the *Sparhawk* case relied are all cases of trespass decided in England in which the question was whether the defendant was a trespasser for destroying or injuring plaintiff's property in the effort to save himself from imminent danger. To hold that he was a trespasser would have been to deny the right to self-

preservation, but this the English courts, with their characteristic sense of justice, declined to do. To decide otherwise would have been to hold that when a man is pursued by assassins he has no lawful right to flee across another man's land without first getting his consent.

The further question, however, whether a defendant who damages plaintiff's property in the effort to save his own life should compensate the plaintiff for any injury which he may have done was apparently not brought to the attention of the courts. Recently, however, it has arisen and been decided in the Supreme Court of Minnesota. It was there held, citing

Ploof v. *Putnam,* 81 Vermont, 471,

that while the defendant had a right to tie up his boat, even against the plaintiff's protest, to the plaintiff's wharf, in order to escape the dangers of a storm, nevertheless he was liable to the plaintiff for any damage that might be caused to the wharf by the boat while the storm was in progress.

Vincent v. *Lake Erie Nav. Co.,* 124 N. W. Rep. (Minn.), 221.

This is an obviously just conclusion, and the advance which it signalizes in our legal concepts should be closely followed in our constitutional decisions. The state should be allowed the right, and even the duty, to take any property which is necessary to the safety of the state, even if the taking be in the form of mere destruction for the purposes of self-preservation; but, nevertheless, the citizen whose property is taken, if his property has been lawfully acquired, should not be compelled to

bear the whole burden of the loss, but the loss should be distributed throughout the community. In other words, the community should compensate him.

In the case at bar complainant acquired his property lawfully and with the permission and license of the State and Federal Governments. The "Eighteenth Amendment" now undertakes to deprive him of it, and this measure of deprivation is defended as being for the benefit of the community. We have been unable to formulate a single plausible argument in support of the position that he is not entitled to compensation for the taking, except the general current of judicial legislation. On the other hand, there are two principles of constitutional law which entitle him to compensation.

The first principle is embodied in the phrase, "Private property shall not be taken for public use without just compensation." It may be urged that the "taking" under that constitutional phrase does not include destruction without subsequent use, but the argument is not persuasive. Destruction begins with a taking, and after the taking the object is destroyed for the public benefit, *i. e.*, the public use. If, however, the compensation clause is insufficient, the due process clause comes to its support: "No person shall be deprived of life, liberty or property without due process of law."

As we have seen, the process of the law is the process of the courts, and that condition precedent must be observed before any taking whatever can take place. But the process of the courts involves more than the mere day in court. It involves the substance of the law to this extent, that before the property can be taken there must be a just ground for the taking. Otherwise of what use is the day in court? If a man has his day in court, only to

find, after being heard in his own behalf, that his life, liberty or property may be taken without a just cause, or without any cause, by legislative authority, of what use is his day in court? In other words, the day in court must result in the disclosure of a just cause for the taking, or it is not a day in court. In that aspect of the case the destruction of property without compensation is a taking without due process of law.

This precise point was adjudged in the case of

Wynchamer v. *People*, 13 N. Y., 378,

a case which has been frequently cited to this Court, but which, so far as we can learn, this Court has never cited but once. The opinion of Judge Comstock in that case is not surpassed among the judicial opinions of this country, for weight of reasoning or for wealth of learning, and we ask the Court's careful attention to it as a complete and adequate decision in favor of complainant.

With this discussion we are now ready to discuss the application of the principle of just compensation to the "Eighteenth Amendment."

Just compensation is guaranteed to complainant by the inherent nature of a republican form of government.

Bill, Section X, paragraph B.

It is expressly guaranteed by the Fifth Amendment.

Bill, Section X, paragraph F.

It is impliedly guaranteed by the Fourteenth Amendment in its due process clause.

Bill, Section X, paragraph G.

It is again guaranteed by the immunities clause of the Fourteenth Amendment.

Bill, Section X, paragraph H.

It is also guaranteed by the guaranty of a republican form of government in Article IV, Section 4.

Bill, Section X, paragraph J.

It is also guaranteed by the state constitutions.

Bill, Section X, paragraphs M, P, R and S.

As is the case with the due process clause, these guarantees amply protect the people against confiscation even by attempted constitutional amendment.

E.

Delegated Powers.

The representatives of the people in their legislative assemblies act with a delegated authority. They are agents, and their acts are the acts of the people whom they represent. Clothed with the authority of agents, they are also subject to the correlative duties of agents—which are those of every fiduciary, and which above all include the duty of loyalty—and those correlative duties operate as limitations upon the delegated authority. While, therefore, our legislative assemblies are authorized to enact laws for the people, they are not authorized to enact laws which betray the people whom they represent.

This is a self-evident principle of law. It operates without constitutional enactment,

Loan Association v. *Topeka*, 20 Wall., 655,

and also it has been constitutionally declared. It will not be seriously questioned—in this country, at any rate.

Whom do the legislators represent?

There has been some doubt on this point. It has been supposed, for example, that Article V of the Constitution, the amendment clause, "delegates" to the state legislatures the authority to ratify proposed amendments. This is serious error, however. Whatever authority they possess is derived solely from the people who elect them. It cannot come from any other source, else they would owe a divided duty—a duty divided between the sources of their authority.

Such a situation would be impossible as a mere matter of practicability, because it would at once introduce an irreconcilable conflict of duties and oftentimes an equally irreconcilable conflict of interests. Moreover, it is impossible as a matter of law. The Federal Government cannot, even through the Constitution, delegate any authority to the states or the agencies of the states. The movement of authority is always in the opposite direction.

The truth is that instead of "delegating" any authority to the state legislatures to ratify amendments, the Constitution was adopted on the assumption that they already possessed it—which, as a matter of law, they did—and that authority was delegated to them by their own people.

The matter is of vital importance, for if the people of the states have delegated their power, they can also limit it, or take it away altogether.

It will not on careful consideration be long doubted that the peoples of the states can do both. The Florida Constitution, for example, in Article XVI, Section 19, provides as follows:

> "No convention nor legislature of this state shall act upon any amendment of the Constitution of the United States proposed by congress to the several states, unless such convention or legislature shall have been elected after such amendment is submitted."

This limitation upon the powers of the Florida legislature has been accepted without question, and if that, why not others? The amendment clause of the Constitution of the United States provides for amendment by popular convention. Can it be supposed for an instant that the peoples of the states cannot reserve the power of ratification to themselves and take it away from their legislatures altogether?

There can be no hesitation about the answer to these questions, and consequently, before any amendment to the Constitution is accepted as a part of the Constitution, the authority of the ratifying bodies should be inquired into and established. When the question is raised in the Federal courts, the duty to inquire into it is imperative under the Constitution, and no Federal court is at liberty to decline the investigation.

The "Eighteenth Amendment" involves the spoliation of the people and is an assault upon all their liberties, as has been already explained at length.

It is, therefore, a breach of the duty of loyalty which is imposed upon the legislators who voted for it and was in excess of their delegated authority, *ultra vires,* null and void.

Bill, Section X, paragraphs C, D, E, I, M, N, O, P, Q, R, S, T, U and V.

F.

The Two-thirds Rule.

We have hitherto discussed the "Eighteenth Amendment" from the point of view of substance as an invasion of reserved, inherent and inalienable rights.

We are now to approach it from the point of view of procedure, and are to consider whether it was validly adopted in accordance with the procedure prescribed by the Constitution of the United States for the proposal of amendments or additions to its own provisions.

Bill, Section X, paragraph L.

The Constitution directs in Article V that "the Congress whenever *two-thirds of both houses* shall deem it necessary, shall propose amendments to this Constitution." This article furnishes the only authority for Congress in the proposing of amendments and determines what action is necessary by that body before the constitutional process of amendment can be initiated. It calls for a vote of two-thirds of both houses, and the natural and normal significance of the phrase, the significance which immediately suggests itself, is that two-thirds of both houses means two-thirds of the full membership of each house. There has been an-

other interpretation of this phrase, however. It has been claimed that two-thirds of *the members present* is sufficient to meet the constitutional requirements.

That claim is necessary to support the present "amendment," because two-thirds of the full membership of both houses did not vote for the joint resolution which submitted it to the state legislatures. The validity of that proceeding is now the subject of our inquiry.

We have said that the obvious meaning of the phrase is that the concurrence of two-thirds of the full membership is requisite for the valid proposal of amendments. The argument to the contrary takes this form substantially:

> By the word "house" is intended a house organized for the transaction of business. A majority of a house constitutes a quorum for the transaction of business; therefore, it is concluded, a session of a "house" containing a quorum constitutes a "house" organized for the transaction of business, and a vote of two-thirds of the body so present comes within the constitutional requirements.

This argument gives to the word "house" a significance which attaches to no single word in the English language. "House" as applied to legislative bodies means either a legislative chamber of such a body or a quorum of such a chamber (see, for example, *Webster's Dictionary*). No dictionary gives any other meaning to it, and some dictionaries, such as the *Century*, do not even give it the meaning of "quorum." (For a full history of the word with

numerous quotations in chronological sequence see *Murray's New English Dictionary.*)

Now, when "house" denotes the chamber, it necessarily denotes the full membership of that chamber, which is a fixed number. When it denotes a quorum, it denotes a fraction of a membership of the chamber, usually a majority or the next integral number above a half, also a fixed number.

Neither of these meanings will satisfy the argument. The first, that the word "house" means the full membership, obviously defeats the argument, while the second leads to the following absurdity:

A quorum is a fixed number. Usually in our constitutions it is the next integral number above a half, and two-thirds of a quorum will in that case be the next integral number above a third of the whole. When three more than two-thirds of the whole are present, therefore, two-thirds of a quorum will be a minority. It follows, to a mathematical certainty, that if two-thirds of a quorum can propose amendments, then, when the whole membership is present, amendments can be proposed and carried by a minority vote, which is absurd.

What the argument has reference to, is a body which is not the full membership nor yet a quorum —both of which are fixed quantities—but a body which is composed of those members, not less in number than a quorum, who are actually present when the chamber is in session and transacting business. Such a body is not fixed in number, but fluctuates from a mere quorum as a minimum to the full membership as a maximum. It is usually, however, larger than the one and smaller than the other. There is no single word in the English language which designates it, and it certainly is not, and never has been, designated by the word

"house." The argument, therefore, gives to the word "house" a meaning which it has never possessed in the English language.

Again, the argument misapprehends the nature of a quorum, and because a quorum can *do* some of the business of the whole house the argument erroneously infers that it *is* the whole house.

This is a fundamental fallacy. A quorum does not become a whole house simply because it can do some of the things which the whole house can do. On the contrary, a quorum begins by being only a fixed fraction of the whole, and ends by being only a fixed fraction of the whole, and a fixed fraction never *is* and never *can become,* the whole. Whatever happens or can happen is that certain powers of the whole (never all the powers, however) are conferred upon the fraction, and that thereupon the acts of the fraction within the prescribed limits become the acts of the whole. It still remains true that, just as it is a fallacy to say that the agent *is* the principal because he can *do* some of the things which the principal can do, so it is a fallacy to say that the fraction *is* the whole because it can *do* some of the things which the whole can do.

Hitherto we have confined ourselves to pointing out defects in the argument which are not conditioned upon the terms of the instrument in which the word "house" is employed, but which would necessarily apply whenever such a phrase is used in any constitution. If possible the argument makes even a worse showing when it is collated with the full text of the Constitution itself.

In the first place, it commits a very real and wholly fatal *petitio principii.* It begs the question. It bases its conclusion upon the assumption in the premises that the conclusion is true. Consequent-

ly, if the conclusion is not true in the premise, it is not true in the conclusion; and in any event the argument is not advanced to the truth.

The assumption is that the word "house" means house as organized for the transaction of business. Now a House of Congress is organized for the transaction of most business when a majority, that is to say, a quorum, is present (Art. I, Sec. 5), but not for all business. The Senate is not organized for the business of trying the President on articles of impeachment unless the Chief Justice of the Supreme Court is present to preside over the trial (Art. I, Sec. 3). The House of Representatives is not organized for the business of electing a President in the case of a tie vote in the Electoral College unless representatives from two-thirds of the states are present (Art. II, Sec. 1). Either House is organized for the transaction of some business, such as the business of adjourning or of summoning absent members, even if less than a quorum is present (Art. I, Sec. 5). Neither House is organized for the business of proposing the amendments to the Constitution unless there are enough members present to give the vote which the Constitution requires.

If the Constitution requires the vote of two-thirds of the full membership, a house is not organized for the business of proposing amendments unless at least two-thirds of the full membership is present. If the Constitution is satisfied with the vote of two-thirds of the members present not less than a quorum, then the House is organized for the business of proposing amendments whenever not less than a quorum is present. The first alternative the argument denies; the latter is the very con-

clusion to be proved. The conclusion is not proved by making it the premise of the argument.

In the second place the argument ignores the constitutional definition of the word "house," just as it ignores the definition of it in common speech. The Constitution ordains that the Congress of the United States "shall consist of a Senate and House of Representatives" (Art. I, Sec. 1), that "the House of Representatives shall consist of members chosen every second year by the people of the several states" (Art. I, Sec. 2); and that "the Senate of the United States shall be composed of two senators from each state chosen by the legislature thereof" (Art. I, Sec. 3).

These are the definitions to which we must look when we would know the constitutional meaning of the word "house." When the Constitution says "both houses," it means the Senate and the House of Representatives. When it means the Senate, it means the body composed of two senators from each state chosen by the legislature thereof. When it means House of Representatives it means the chamber composed of members chosen every second year by the people of the several states. With these definitions contained in the Constitution itself, the conclusion is compulsory that two-thirds of both houses means two-thirds of the members chosen every second year by the people of the several states, and two-thirds of the senators from each state chosen by the legislature thereof.

In the third place the argument overlooks the general constitutional use of the word "house." There are, for example, five fractions of a legislative house mentioned at various times in the Constitution. Illustrations of these fractions are as follows:

"Two-thirds of both houses" (Art. II);
"Two-thirds of the members (of the Senate) present" (Art. I, Sec. 3);
"A majority of each (house)" (Art. I, Sec. 5);
"A smaller number (than a majority of each house)" (Art. I, Sec. 5);
"One-fifth of these (members of either house) present" (Art. I, Sec. 5).

In the last four of these fractions the whole house constitutes the unit of which the fraction is a part, and there is everything in the sequence to indicate that the same unit is assumed in the first fraction. If, for example, "a majority of each (house)" denotes a majority of the full membership, what does "two-thirds of both houses" mean? Again, outside of the name "House of Representatives," the word "house" is used twenty-two times in the Constitution, either expressly or by reference in an elliptical phrase. In nineteen instances it necessarily denotes the whole house composed of all its members. In the other three it is used in connection with the fraction two-thirds. If there had been any intention to give the word a different meaning in those three cases, some qualifying phrase would have been necessary to indicate it. The absence of any such qualifying phrase is conclusive proof that no difference was intended.

Still again, the Constitution provides (Art. II, Sec. 3) that the President "may on extraordinary occasions *convene both houses.*" Here obviously the President must convene the whole membership. If the phrase "both houses" means the whole house for the purposes of convening, what does it mean for the purpose of proposing amendments? If it had been intended to refer to different things

on different occasions, it would have been necessary to introduce a qualifying clause to distinguish them.

In all these instances we find the argument introducing a qualifying phrase in circumstances in which its absence conclusively proves that it was not intended.

In the fourth place the argument ignores those instances in which a distinguishing and qualifying phrase is actually employed in the Constitution. The necessity is to have the word "house" defined as that fluctuating body composed of members present, not less than a quorum, which is neither the fixed number of the full membership nor an equally fixed number of a quorum or majority, but the argument overlooks the fact that the Constitution employs a specific and appropriate phrase for that particular fraction of the membership. *"Two-thirds of the members present"* are necessary to a conviction by the Senate on articles of impeachment. *"One-fifth of those present"* may demand the yeas and nays (Art. I, Sec. 5); *"two-thirds of the senators present"* must concur in the making of a treaty (Art. II, Sec. 2). Now, if the Constitution uses a qualifying phrase in three instances, when the qualification was intended, why was it not used on all such occasions?

In the fifth place, in one of the three instances in which the two-thirds fraction is used in connection with the word "house," the argument produces an irremediable absurdity. When the President disapproves a bill passed by both houses, he returns it "to *that house* in which it shall have originated," who shall thereupon reconsider it, and "if after such reconsideration two-thirds *of that house* shall agree to pass the bill," it shall be sent

"to the other house" and "if approved by two-thirds *of that house* it shall become a law" (Art. I, Sec. 7).

One thing is clear in that veto clause of the Constitution: That legislative body *in* which a bill originates, *through* which it passes, *to* which it is returned by the President, and *by* which it is reconsidered and transmitted *to* the other house, is one and the same during the whole process—a legislative entity, unitary and continuing.

Now, only the house as a whole constitutes a legislative continuing entity. A quorum certainly does not fit the description. It disappears upon adjournment and does not come into existence again. When the house reconvenes, a new quorum is formed. Between sessions, there is no quorum at all. Consequently when the President returns a bill, he must return it to the whole house. He cannot return it to *that quorum* in which it originated. The same considerations apply even more strongly to that fluctuating body of members present which the argument requires. It disappears upon adjournment; it shifts and changes even during a continuous session; and a bill which originates in it cannot afterwards be returned to it.

Now observe the conclusion: if the words "that house" in the phrase requiring the President to return the bill to "that house in which it shall have originated" does not mean a quorum and does not mean the body of members not less than a quorum, but means the full membership of the house, then the phrase "that house" in the clause that "if after such reconsideration two-thirds of that house shall agree to pass the bill" must necessarily mean the full membership. Things which are equal to the same thing are equal to each other, and the whole house in which the bill originates must be the whole

house in which the reconsideration is to take place.

Furthermore, if two-thirds of the house in which the bill originates agrees to pass the bill, it shall then be sent to "the other house." What does "other house" mean in that phrase except the other of the two houses of a Congress consisting of the Senate and the House of Representatives?

The succeeding clause of that article of the Constitution relates to concurrent resolutions and declares that they shall not become a law unless "repassed by *two-thirds of the Senate and House of Representatives,* according to the Rules and Regulations prescribed in the case of a bill" (Art. I, Sec. 7). Here the requirement of a two-thirds vote of the whole house is expressly made, and at the same time, too, the regulations for bills are expressly made identical with the regulations for concurrent resolutions. There is no room for doubt that the word "house" in the veto clause means the whole house and not merely a quorum of it, and not merely that fraction of it which constitutes all the members present, not less than a quorum.

In the sixth place, and finally, the argument fails in the very clause under discussion. The Constitution provides the amendments to it may be proposed by a vote of "two-thirds of both houses" (Art. V). We cannot, however, make the substitution of words that ought to be possible if they mean the same thing. We cannot say that amendments may be proposed by two-thirds of both quorums; still less can we say that they may be proposed by two-thirds of both bodies of members present not less than a quorum. The Constitution does not say those things because it does not mean them.

This Court has held in the case of

Missouri Pacific Ry. Co. v. *Kansas*, 248 U. S., 276,

that the so-called Webb-Kenyon Law, regulating interstate traffic in liquors, was constitutionally passed by Congress over the President's veto, although it was only passed by a two-thirds vote of the Senators present and not by two-thirds of the whole Senate. It is therefore a decision relating to the two-thirds provision in Article I, Section 5 of the Constitution. It is not a decision as to the interpretation of the words "both houses" in the Fifth Article of the Constitution. It does indeed discuss the interpretation of the amendment clause, but its discussion is necessarily *obiter* and not conclusive. It is not, and cannot be, conclusive, either upon the rights of those who are not parties to that suit, or upon the interpretation of a clause of the Constitution not then before the Court for construction.

Even if the decision on the construction of the veto clause of the Constitution were conclusive upon the construction of the amendment clause in the same instrument, we should nevertheless contend that we are within our rights in asking the Court to re-examine it upon new grounds.

In constitutional questions there can be no doctrine of *stare decisis*, and the reason is this: No human tribunal is immune to the possibility of error—not even this Court, to which the people of this country so confidently look as the bulwark of their liberties. What happens, therefore, when it erroneously interprets, or erroneously applies, a constitutional provision? It has no power to amend

the Constitution, and the constitutional provision still remains the law. No number of judicial decisions can change the Constitution, and just as it is possible and proper for any attorney to challenge the constitutionality of an act of the state legislature or of Congress as repugnant to the Constitution, so it is possible and proper for an attorney to challenge any decision of this Court upon proper grounds as repugnant to the Constitution. In the exercise of that right and with the utmost respect to this Court, we submit here our reasons for believing that the decision of this Court in the *Missouri Pacific* case is repugnant to the Constitution, and that a bill is not passed over the President's veto unless it receives the votes of two-thirds of the full membership of both houses of Congress, and that an amendment is not constitutionally proposed to the states unless it receives the votes of two-thirds of the members of both houses.

We have already given some of the reasons sustaining our argument. It remains now to consider the opinion of this Court in the *Missouri Pacific* case.

The Court begins its consideration of the question by saying that

> "we might adversely dispose of it [that is, the contention that the bill was not properly passed over the President's veto by a vote of two-thirds of the full membership] by merely referring to the practice to the contrary which has prevailed from the beginning."

We submit, however, that no practice can change a constitutional provision, and no practice, con-

temporaneous or subsequent, is admissible to vary its terms. If the contrary were true, our Constitution would be but a scrap of paper, amendable, repealable, destructible, by the whim of any series of Congresses that might choose to disregard it.

The Court, further stating the contention of counsel, goes on to say:

> "As the context leaves no doubt that the provisions (*i. e.*, Art. I, Sec. 5) was dealing with the two houses as organized and entitled to exert legislative power, it follows that to state the contention is to adversely dispose of it."

With deference to the Court, we submit that, according to the context, to state the argument is to prove it. A house organized and entitled to exert legislative power is the whole house and not the quorum. When the yeas and nays are taken, the entire membership must be called, and the whole house is in session. Although only a quorum is present, the statute is enacted, as declared in the enacting clause, "By the Senate and House of Representatives of the United States of America in Congress assembled." The provision therefor necessarily means the whole house and not any fraction of it. Consequently the context sustains the argument instead of disposing of it adversely.

The Court goes on to say that the "erroneous assumption upon which the contention proceeds is plainly demonstrated by a consideration of the course of proceedings in the convention which framed the Constitution," and it thereupon refers to a record of those proceedings. Again we submit with deference that the course of proceedings in

the convention are quite immaterial to the interpretation of the Constitution. That instrument was submitted to the people as a completed whole. The proceedings of the Constitution were studiously kept from their cognizance and they were called upon to judge the instrument by its face and not by the preceding negotiations of which it was the outcome. Nothing, therefore, but the Constitution itself can be logically or lawfully the source of its interpretation.

The Court goes on to say:

> "A further confirmation of this view is afforded by the fact that there is no indication in the constitutions and laws of the several states existing before the Constitution of the United States was framed that it was deemed that the legislative body which had power to pass a bill over a veto was any other than the legislative body organized conformably to law for the purposes of enacting legislation, and hence that the majority fixed as necessary to override a veto was the required majority of the body in whom the power to legislate was lodged."

Granted, but again we submit with deference that the inference is quite the opposite to that which the Court drew. The body in whom the power to legislate is lodged is, as we have said before, the whole house, and the enactment of a bill is the act of the whole house and not the act of the mere quorum. That appears from the fact that the whole house must be called on roll call and from the enacting clause of all statutes.

The Court goes on to say:

> "Indeed, the absolute identity between the body having authority to pass legislation and the body having the power in case of a veto, to override it, was clearly shown by the Constitution of New York (1777), since that Constitution, in providing for the exercise of the right to veto by the council, directed that the objections to the bill be transmitted for reconsideration to the Senate, the house in which it originated; 'but if after such reconsideration, two-thirds of the said Senate or House of Assembly, notwithstanding the said objections, agree to pass the same, it shall * * * be sent to the other branch of the legislature, where it shall also be reconsidered and if approved by two-thirds of the members present, shall be a law'—thus identifying the bodies embraced by the words 'Senate' and 'House' and definitely fixing the two-thirds majority required in each as two-thirds of the members present."

Again, with deference we submit that the state constitution thus cited clearly establishes the distinction between two-thirds of the whole house and two-thirds of the members present, and that no interpretation of it is possible except that two-thirds of the whole house in which the bill originated was necessary to its repassage, although two-thirds of the members present of the other house was sufficient to make its repassage effective.

The Court goes on to say that

> "The identity between the provision of article V of the Constitution, giving the power by a two thirds vote to submit amendments, and the requirements we are considering as to the two-thirds vote necessary to override

> a veto, makes the practice as to the one applicable to the other."

It then proceeds to cite the record of the first session of Congress at which the first ten amendments to the Constitution were proposed. The records thus cited declare that the Senate concurred in the proposal of the amendments, "two-thirds of the senators present concurring therein," and that the house also concurred, "two-thirds of the members present concurring on each vote." Upon those records as a premise the Court declares that the first ten amendments were

> "all adopted and submitted by each house organized as a legislative body pursuant to the Constitution by less than the vote which would have been necessary had the constitutional provision been given the significance now attributed to it. Indeed, the resolutions by which the action of the two Houses was recorded demonstrate that they were formulated with the purpose of refuting the contention now made."

Again, with deference to this Court, we submit that proof that two-thirds of the members present concurred in the vote is not proof that two-thirds of the whole house did not concur. *Non constat* that more than two-thirds of the senators present concurred, enough to make two-thirds of the whole house, and *non constat* that the whole house was not present and that consequently two-thirds of the members present was not two-thirds of the whole house. Proof that twelve men did vote for a proposition is not proof that fifteen men did not vote for it. Some of the amendments seem to have been accepted unanimously.

The Constitution provides that the yeas and nays must be taken on the motion of one-fifth of the members present. It seems to have been the early practice not to record the yeas and nays except when so demanded, and it is more than probable that the record of the actual votes on the first ten amendments is lost forever. The resolution by which the amendments were submitted to the state legislatures reads, "Two-thirds of both Houses concurring," and under those circumstances the formal record of the adoption of the amendments pursuant to the requirements of Article V is complete. There can be no real question that the first ten amendments were properly adopted.

The Court then goes on to say:

> "The construction which was thus given to the Constitution in dealing with a matter of such vast importance, and which was necessarily sanctioned by the states and all the people, has governed as to every amendment to the Constitution submitted from that day to this. This is not disputed and we need not stop to refer to the precedents demonstrating its accuracy. The settled rule, however, was so clearly and aptly stated by the Speaker, Mr. Reed, in the House, on the passage in 1898 of the amendment to the Constitution providing for the election of Senators by vote of the people, that we quote it."

Mr. Reed's remarks are then quoted as follows:

> "The question is one that has been so often decided that it seems hardly necessary to dwell upon it. The provision of the Constitution says 'two-thirds of both houses.' What constitutes a house? A quorum of the membership, a majority, one-half and one

more. That is all that is necessary to constitute a house to do all the business that comes before the House."

This passage cited from the ruling of Speaker Reed excellently illustrates the confusion which has attended the discussions of this problem. He says that a majority of the house is one-half and one more. It may on occasion, that is, when the number of members is uneven, be one-half and *one-half* more. Mr. Reed also says that a majority is all that is necessary to constitute a house to do the business that comes before the house. That again is not correct. On some matters, as we have seen, more than a majority is necessary for the transaction of business by a house. Thus the House of Representatives cannot elect a President in the case of a tie vote in the Electoral College unless Representatives of two-thirds of the states are present. These errors in Mr. Reed's ruling detract greatly from its authority. Moreover, it cannot be reiterated too often that the Constitution cannot be changed by practice or by the rulings of presiding officers. It prescribes its own methods of amendment, and the practices and rulings of the House of Congress are not among them.

After again referring to the practice as to the adoption of amendments to the Constitution and the practice of voting on repassage of bills over presidential veto, the Court cites a number of cases in other jurisdictions among the state courts. They arise, of course, under other instruments than the Constitution of the United States, and consequently are not conclusive as to that instrument. Above all, they cannot override it.

Our examination of the opinion of this Court in the *Missouri-Pacific* case discloses the following facts:

1. It does *not* discuss the meaning of the word "house" in the English language; on the contrary, it gives it a meaning which has no precedent.

2. It does *not* consider the constitutional definitions of the Senate and House of Representatives which constitute "both Houses."

3. It does *not* discuss the general use of the word "house" in the Constitution, either in connection with the various fractions of a house or in its general connections.

4. It does *not* discuss the constitutional phrase "two-thirds of the members present," or its significance in indicating that when the Constitution intends that fraction, it uses that phrase to indicate its intention.

5. It does *not* discuss the possibility of substituting its definition of the word "house" in place of the language used in the Constitution.

6. It does *not* discuss the difference between a quorum and the body of members present, not less than a quorum. Apparently it confuses the two, because in one place it speaks of "a two-thirds vote of the senators present (a quorum)," and in another place it speaks of "a quorum (a majority) of the members of each House (Sec. 5, Art. I)."

7. It does *not* contain any reference to the text of the Constitution, except a brief reference to the "context" of the instrument and

to the "identity" between the veto provisions and the amendment provisions of the Constitution.

8. It *does* discuss the proceedings in the Constitutional Convention.

9. It *does* discuss "the constitution and laws of the several states existing before the Constitution of the United States was framed."

10. It *does* discuss the practice in adopting amendments to the Constitution.

11. It *does* discuss some of the records of Congress.

12. It *does* discuss certain rulings in Congress.

13. It *does* discuss certain judicial decisions rendered in the state courts under other instruments.

14. In fine, it *does* discuss many collateral matters, but it does *not* discuss the instrument to be construed.

The dominating feature of the opinion is the constant references to the practice in adopting the prior amendments of the Constitution; and undoubtedly, if the requirements of the Constitution have not been followed in adopting them, a grave and serious problem is certainly presented. It may be that some of the amendments have not in fact become a "part of the Constitution." There seems to be no ground for apprehension concerning the first ten amendments, because the joint resolution of the houses of Congress conforms to the constitu-

tional requirements, and the possibility of disputing the accuracy of its recital that two-thirds of both houses concurred in it has probably disappeared by the lapse of time. As to the later amendments, however, there may be some doubt, and it may be that the doubt can only be resolved by an examination of the original records of the Congressional proceedings. If that is so, the matter should be immediately determined. The American people cannot afford to leave its organic law in doubt. Above all, it cannot afford to have its organic law depend upon an interpretation of a word which is without historic precedent, or upon an interpretation which does not take into account the definitions of the word which the organic law itself contains.

POINT VI.

In Conclusion.

Upon all grounds we submit that the bill should be filed. It is within the jurisdiction of the Court with respect to subject-matter and parties, and it is sufficient on its merits.

New York, January 2, 1919.

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